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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1375

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Texas Eastern Transmission Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 20, 1969.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 414 F.2d 344. It is printed as Appendix B hereto, *infra*, pp. 27-37. The orders of the Federal Power Commission, Opinion Nos. 540 and 540-A, are published at 39 F.P.C. 630 and 40 F.P.C. 62.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1969, *infra*, p. 27. Rehearing was denied on Decem-

ber 30, 1969 (R. 793). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Does the Federal Power Commission have the power under Section 4(e) of the Natural Gas Act to deprive a natural gas pipeline company of refunds resulting from the disallowance of supplier rate increases paid by such pipeline company but not passed on to its customers?

2. May the Commission deprive a pipeline of supplier refunds applicable to a past period simply because the Commission-approved rates charged by the pipeline during such past periods are subsequently determined to have produced excessive earnings?

3. Assuming the Commission is not required by Section 4(e) to order payment of supplier refunds to the pipeline which paid the increased supplier rates, is the Commission required to distribute such refunds in accordance with equitable principles as enunciated by this Court in *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949)?

4. After changing the established disposition of refunds, may the Commission apply its "newly enunciated policy" to past periods during which natural gas companies, their customers and the Commission have entered into and partially performed contracts in reliance on the previously established disposition of refunds?

5. May the Commission in a subsequent proceeding change the disposition of refunds previously specified in settlement contracts and final Commission orders disposing of supplier rate increases?

STATUTE INVOLVED

The statutory provision involved is Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), which is printed in Appendix A, *infra*, pp. 25-26.

STATEMENT

Established Disposition of Refunds Under Section 4(e)

Where a supplier of natural gas who is subject to the jurisdiction of the Federal Power Commission files a rate increase, Section 4(e) of the Natural Gas Act permits such rate increase to be put into effect and collected subject to refund from the pipeline-purchaser. If this is done, the Commission is empowered by Section 4(e) at the culmination of proceedings conducted thereunder "to order such [supplier] to refund, with interest, the portion of such increased rates or charges by its decision found not justified." For more than 25 years after the Act was passed in 1938, the Commission uniformly ordered all such refunds paid to the pipeline which had paid the increased supplier rates (R. 734). Where the pipeline, in response to the supplier rate increases, filed its own "tracking" rate increases, the Commission, as part of the pipeline's rate proceeding, would frequently require "flow through" of refunds received by the pipeline as a result of Commission disallowance of its supplier's rate increase. However, if the pipeline absorbed the supplier rate increases (by not passing them on to its customers in the form of increased rates), the Commission regularly ordered the supplier to make refunds to the pipeline which retained such refunds (R. 413, 417).

This case is one of first impression in which the Commission has changed the consistent interpretation of its powers under Section 4(e) over the disposition of refunds

and has retroactively applied this newly found statutory power to past periods. In particular, the Commission in 1968 ordered Texas Eastern to flow through to its customers refunds resulting from the disallowance of supplier increases admittedly absorbed by Texas Eastern during the years 1961 through 1964 (R. 734).

Texas Eastern's 1961 Settlement

During the years 1961 through 1964, Texas Eastern charged its customers the rates fixed by the Commission in its order issued January 25, 1961 approving a settlement of two Texas Eastern rate increase proceedings (R. 290-334). By this 1961 settlement Texas Eastern agreed to a limited flow-through obligation with respect to refunds which might be generated by the disallowance of rate increases then being collected by its suppliers. It was agreed (R. 307-310) that Texas Eastern would flow through to its customers any supplier refunds (i) which were attributable to gas purchased during the period the settlement rates remained in effect *and* (ii) which resulted from the disallowance of any of the 520 specified supplier rate increase proceedings included in the cost of service used to fix the settlement rates (R. 318, 320). Conversely, Texas Eastern had no obligation under the 1961 settlement to flow through any refunds it was entitled to receive as a result of the disallowance of (i) any of the 173 additional supplier rate increase proceedings which had been filed and were pending but which were not included in the 1961 settlement cost of service (R. 406-07), or (ii) supplier rate increases filed subsequent to the settlement.

Events After Texas Eastern's 1961 Settlement

After approval of Texas Eastern's 1961 settlement, its suppliers filed and collected, subject to refund, additional rate increases which resulted in increased gas costs to

Texas Eastern for the calendar years 1961 through 1964 of approximately $20 million in excess of the costs used to establish the 1961 settlement rates (R. 410, 576). Texas Eastern did not file a rate increase to pass on any of these additional costs to its customers but continued to charge its customers the rates fixed by the 1961 settlement (R. 412).

Certain of these supplier rate increases were disallowed and refunds required. As a result, until July 1964, Texas Eastern received approximately $17.3 million in refunds as a result of the disallowance of such supplier rate increases. Approximately $11.6 million of this amount was attributable to the disallowance of supplier rate increases included in the settlement cost of service and was flowed through by Texas Eastern to its customers in accordance with the provisions of the 1961 settlement (R. 416). The remaining balance of $5.7 million represented refunds resulting from supplier rate increases not included in the settlement cost of service (R. 410).[1] This amount was retained by Texas Eastern in accordance with the understanding of the parties to the 1961 settlement and the Commission's uniform disposition of refunds resulting from the disallowance of supplier rate increases (R. 413).

Texas Eastern's customers gave written releases acknowledging that the refunds disbursements made by Texas Eastern were in accordance with the 1961 settlement (R. 340, 346, 368, 378). Likewise, the Commission advised Texas

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[1] The $5.7 million of refunds retained by Texas Eastern should be compared to the $20 million of supplier rate increases absorbed during the period 1961-1964 (R. 575). In the orders under review, the Commission stated that the supplier refunds at issue totalled $10 million (R. 735). Therefore, even if Texas Eastern were to receive and retain all of the supplier refunds, it would still have absorbed a net increase of $4.3 million.

Eastern that such refund dispositions constituted satisfactory compliance with the Commission's order approving the 1961 settlement (R. 341, 347, 352, 358, 362, 369).

Steps Leading Up to Change in Disposition of Refunds Under Section 4(e).

In July 1964, the Commission abruptly announced that it was reconsidering the disposition of refunds it had consistently followed for more than 25 years and that in instances where a pipeline claimed the right to retain supplier refunds, the Commission would prescribe the procedure "for determining the relative rights to such funds of such pipelines or its customers". *Humble Oil & Refining Co.*, 32 F.P.C. 49 (1964). Subsequently, the Commission disallowed additional supplier rate increases paid and absorbed by Texas Eastern during the years 1961-1964, but directed the suppliers to retain the refunds payable to Texas Eastern pending further Commission order. The Commission likewise directed suppliers to halt payment to Texas Eastern of any additional refunds specified in settlement contracts and final orders previously issued by the Commission.[2]

On October 4, 1965, the Commission instituted proceedings in Docket RP66-12 to determine whether:

> "Texas Eastern is entitled to receive and retain any of the sums of money collected from Texas Eastern by its jurisdictional suppliers which the suppliers have been directed to refund with interest, but which, pur-

[2] During 1961 and 1962, Texas Eastern had entered into and the Commission approved settlement contracts disposing of certain rate increases filed and collected by Texas Gas Transmission Corporation (26 F.P.C. 924) and United Gas Pipe Line Company (27 F.P.C. 504). These settlement contracts directed the suppliers to pay specified future refunds to Texas Eastern. In 1963, the Commission had issued a final order disposing of rate increases filed and collected by Southern Natural Gas Company wherein Southern Natural was directed to pay specified future refunds to Texas Eastern (29 F.P.C. 323).

suant to the orders referred to . . . , they have been directed to hold pending further order of the Commission" (R. 672).

Texas Eastern sought review of the Commission's refund retention orders and its order instituting the proceeding in Docket RP66-12. The Court of Appeals for the Fifth Circuit dismissed Texas Eastern's petitions as premature. *Texas Eastern Transmission Corp.* v. *FPC*, 357 F.2d 232 (5th Cir. 1966).

The Commission's Orders

Thereafter, the Commission conducted further proceedings which culminated in Opinion 540 issued May 3, 1968 (R. 734). In its opinion, the Commission for the first time departed from the "normal practice of intermediate pipelines not under an express flow-through obligation retaining all supplier refunds" (R. 754). The Commission held that it had the power "to order disposition of the subject refunds to a person other than Texas Eastern" (R. 738). The Commission predicated this power on general statements as to its duty to protect ultimate consumers (R.745) but then admitted that under the Act it had no power to see that the refunds reached them because it did not have jurisdiction over local distribution companies subject to state regulatory authority (R. 746).

The Commission then held that in the future a pipeline's only protection against supplier increases would be to file its own "tracking" rate increase under Section 4. Obviously, it was too late for Texas Eastern to file "tracking" rate increases with respect to supplier rate increases it had paid during 1961 through 1964. Even so, the Commission held that despite Texas Eastern's absorption of these supplier rate increases, it was not entitled to any of the refunds because the Commission approved rates charged its customers during the years 1962-1964 had

resulted in Texas Eastern earning more than a reasonable rate of return on its investment during such past period (R. 755).[3]

The Commission recognized that certain settlement contracts and prior Commission orders — relating to supplier rate proceedings — specified payment of certain refunds to Texas Eastern. However, the Commission held that these contracts and orders were not a bar to the exercise of its "newly enunciated policy" because they were concerned with the lawfulness of the supplier rates there in issue and not the persons ultimately entitled to retain the refunds specified therein (R. 379).

The Commission disavowed any power to determine the equity of the claims of Texas Eastern, its customers and the consuming public to the refunds resulting from the disallowance of these past supplier rate increases and to distribute them in accord with equitable principles, stating (R. 759):

> "Unlike the courts operating pursuant to their equitable powers in cases like *Interstate, supra,* we have no authority to enforce potential consumer rights in either the direct sales or the local distribution situation."

[3] The Commission's orders did not reveal what rate of return it considered reasonable for Texas Eastern for these past three years. In its order instituting the proceedings in Docket RP66-12, the Commission had noted that 6.5% was the highest rate of return it had previously allowed a pipeline and that according to figures attached to the order Texas Eastern enjoyed an "apparent excess in revenues" during the years 1962, 1963 and 1964 (R. 669-673). In response to the Commission's order, Texas Eastern, while denying the relevance of the rate of return generated by its past firm rates, filed a report showing that in each of the years 1962, 1963 and 1964 it had earned a rate of return substantially less than 6.5% (R. 675-77). In the Docket RP66-12 proceedings the Commission Staff introduced evidence to show that Texas Eastern's past firm rates had resulted in a rate of return in excess of 6.25% for the years 1962, 1963 and 1964 (R. 586).

Accordingly, the Commission ordered the refunds paid to Texas Eastern's distribution company customers even though a substantial portion of the refunds will not be flowed through to consumers but will be retained by such distribution company customers.[4]

On rehearing, Texas Eastern pointed out that refunds applicable to the year 1961 were also in issue and that there was no evidence concerning the rate of return earned by Texas Eastern during 1961 or what would have been a reasonable rate of return for that year. In Opinion 540-A, the Commission admitted that "there is no evidence as to the rate of return Texas Eastern earned that year" but held that Texas Eastern was not entitled to any of the 1961 refunds because it failed to "introduce evidence to show that Texas Eastern earned less than a reasonable rate of return in 1961" (R. 773-774).

Decision of the Court Below

The court below affirmed the orders of the Commission. However, it is evident from the court's opinion that it believed that affirmance of the Commission's orders would result in further proceedings before the Commission for the purpose of (i) assuring that the refunds would, to the extent possible, be passed on to the ultimate consumers and (ii) determining the equities between Texas Eastern and its distribution company customers to that portion of the refunds which would not or could not be flowed through

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[4] Extensive surveys by the Commission have revealed that only a limited portion of refunds ordered by the Commission ever reach the ultimate consumers. For example, the Commission's surveys show that UGI Corporation, a stockholder owned utility which operates the Philadelphia Gas Works, an intervenor in this proceeding, retained more than 58% of the refunds it received between July 1961 and July 1964 as a result of Commission orders (R. 517-521).

to the ultimate consumers. In this regard, the court below stated (414 F.2d at 350, p. 37 *infra*):

> "Texas Eastern lost its claim on the merits as against the consumers but it may justly complain that its equities may exceed those of its distributor-customers in the event the refunds are not flowed through to the consumer. The matter has been remanded by the Commission to the hearing examiner for disposition of the refunds. The examiner held, and the Commission agreed, that '. . . In line with the *Interstate* case further proceedings are necessary to insure that the sums here at issue, to the extent possible, be passed on to the ultimate consumers in accordance with the objectives of the Natural Gas Act.'"

Texas Eastern timely filed a petition for rehearing. The court below requested the Commission to file a response (R. 783).[5] In its response, the Commission candidly conceded that it did not intend to conduct further proceedings to effect an equitable distribution of the refunds. The Commission again acknowledged that its orders would produce "an inequitable result" because a substantial portion of the refunds would not be flowed through to consumers but would be retained by Texas Eastern's customers (R. 784). The Commission simply reiterated "that it, unlike the courts, had no authority to enforce consumer rights" (R. 784). The court below requested the Commission to file an additional brief on the question of whether Texas Eastern was entitled to certain of the refunds based on the provisions of settlement contracts and prior orders of

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[5] Rule 40 of the Federal Rules of Appellate Procedure provides *inter alia:*

> "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request."

the Commission (R. 788). The Commission again recognized that these settlement contracts and final orders specified payment of the refunds to Texas Eastern but denied that they gave Texas Eastern any vested right to retain the refunds (R. 789). After considering the matter for more than five months and requiring two different sets of briefs, the court below summarily denied rehearing on December 30, 1969 (R. 793).

REASONS FOR GRANTING THE WRIT

1. Importance and Impact.

This case presents four important questions as to the scope and proper exercise of the Commission's power over the disposition of refunds ordered under Section 4(e) of the Natural Gas Act. The fifth question has widespread significance because of the Commission's use of the settlement process to cope with its staggering administrative burden.

The industry-wide importance of these issues has been recognized by all parties from the inception of this proceeding. Thus, in dismissing as premature earlier petitions to review filed by Texas Eastern, the court below noted (357 F.2d at 232-33):

> "The novel orders of the Federal Power Commission attacked in these proceedings mark the Commission's decision to take a new and close look at its jurisdiction over refunds generated under Section 4(e) of the Natural Gas Act."

Likewise, in the orders under review, the Commission stated (R. 762-63):

> "As all parties have recognized in their briefs, this proceeding involves an issue of first impression as a contested matter before the Commission; it is a 'novel' issue without administrative precedent."

Thus, it is clear that the questions presented by this petition transcend the instant case and warrant review by this Court because of their industry-wide implications and vital importance to proper administration of the Natural Gas Act.

2. Lack of Statutory Power.

In the orders under review the Commission reversed the long standing interpretation of its authority under Section 4(e) of the Act over the disposition of supplier refunds. To justify its newly found statutory power, the Commission held that "the literal wording of the Act does not direct to whom the subject refunds must be paid" (R. 744). In so holding, the Commission overlooked the accounting provision of Section 4(e) which requires a supplier of natural gas which has increased its rates "to keep accurate accounts in detail of all amounts received by reason of such increase *specifying by whom and in whose behalf such amounts were paid.*" [6] The court below acknowledged the accounting provision of Section 4(e) but condoned the Commission's new interpretation of its statutory authority on the ground that "the purpose of the Act [is] to protect ultimate consumers of natural gas" (414 F. 2d at 347, *infra*, p. 32).

The orders of the Commission and the decision of the court below are contrary to the plain meaning of the statute, are in conflict with this Court's *Sunray* decision,[7] and have already destroyed the rate stability heretofore enjoyed by consumers. In *Sunray* one of the questions was whether the Commission had the power under Section 4(e) to require a natural gas company to make refunds below the in-line price at which sales of gas had been certificated.

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[6] All emphasis is supplied unless otherwise indicated.

[7] *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968).

This Court held that the previously certificated rate constituted a floor or lower limit on the Commission's refund power. In so holding, this Court relied heavily on the accounting provision of Section 4(e) and clearly indicated the proper guidelines for the construction of that statutory provision:

> "We adhere to the dicta in *Callery* and *Sunray Mid-Continent. That outcome comports better with the language of § 4(e) than does the alternative.* It is true that § 4(e) in terms gives the Commission power to refund 'the portion of such increased rates or charges' found to be excessive, and *does not expressly limit* the refund to the rate increase or increment. However, *the accounting provision,* which appears earlier in the same sentence, requires that the producer account only for the 'amounts received by reason of such increase'. If it had been intended that the refund obligation should extend to greater amounts, *the accounting requirement* logically should have extended to them also." 391 U.S. at 23-24.

Application of such guidelines to the present case removes any doubt that the subject refunds should be paid to Texas Eastern instead of its distribution company customers.[8] In particular, the accounting provision of Section 4(e) makes it clear that refunds are to be paid to the one who paid the increased rates. Otherwise there would be no reason to require a supplier of natural gas which had increased its rates "to keep accurate accounts in detail of all amounts received by reason of such increase, *specifying by whom and in whose behalf such amounts were paid.*" Moreover, in *Sunray* this Court was well aware of its previous statements as to the general purpose of the Act,

[8] It is undisputed that those customers did not pay any of the excessive supplier rates which generated the refunds but were charged only the rates which the Commission had fixed for Texas Eastern during the years 1961-1964.

which were relied on by the court below, but nevertheless adopted a construction of Section 4(e) which was consistent with the plain meaning of the statutory language even though such construction resulted in a reduction of refunds that could have been ordered.

Corrective action by this Court is required not only because of the erroneous construction of Section 4(e) by the court below but also because of the "great proliferation of supplier rate increases . . . and concomitant increase in the Commission's work load" (R. 753) which have resulted from the Commission's "newly enunciated policy" with respect to the disposition of supplier refunds. Despite the Commission's prediction to the contrary (R. 753), it has been besieged with a multitude of pipeline rate increases since the issuance of Opinion 540. As a result, consumer price stability has been destroyed. Former FPC Commissioner William R. Connole, who was well known for his consumer views, foresaw this result when he testified that (R. 446):

> "Unless pipelines could be sure that they were entitled to receive and retain any refunds resulting from supplier increases which they elect to absorb they would be required to file a rate increase with each increase filed by every supplier. The result would be administrative chaos."

3. Prohibition Against Reparations.

The Commission ordered the subject refunds paid to Texas Eastern's customers because of its finding that "in each of the three years in issue Texas Eastern in fact earned substantially more than a reasonable rate of return on its investment" (R. 755). The awarding of the refunds to Texas Eastern's customers on account of the level of earnings generated by Texas Eastern's past firm rates violates the prohibition against reparations and conflicts with this Court's decisions in *Montana-Dakota Util. Co.* v. *North-*

western Pub. Serv. Co., 341 U.S. 246 (1951) and *FPC* v. *Sunray DX Oil Co., supra*, and the decision in *Hope Natural Gas Co.* v. *FPC*, 134 F.2d 287, 319 (4th Cir. 1943), *rev'd on other grounds*, 320 U.S. 591, 618. The court below sought to sidestep the reparations question by holding that if the Commission has "the power of disposition over the refunds then the question becomes one of entitlement and not of reparations" (414 F.2d at 349, *infra* p. 35). However, this holding begs the question for if the Commission does not have the power to award reparations it cannot do so in the guise of determining entitlement to refunds under Section 4(e).

In each of the foregoing cases the court made it crystal clear that the Commission does not have the power to award damages, refunds or reparations to Texas Eastern's customers simply because the firm, just and reasonable rates charged those customers result in a rate of return in excess of the rate of return the Commission now determines should have been earned. Thus, in its latest pronouncement on reparations, this Court stated:

> " It seems incontestable that if a producer consistently sells gas at the price specified in a final, permanent certificate, and does not attempt to increase his price, *the Commission may not order him to make refunds simply because the just and reasonable rate for his area turns out to be below the in-line price. This would amount to a reparation order and this Court has repeatedly held that the Commission has no reparation power.*" *FPC* v. *Sunray DX Oil Co.*, 391 U.S. at 24.

4. Conflict With Interstate and Its Progeny.

The Commission made no attempt to dispose of the subject refunds in accordance with equitable principles. In this connection it is undisputed that during the years 1961-1964, Texas Eastern paid and absorbed the supplier rate

increases which generated the subject refunds. Thus, Texas Eastern's customers suffered no increased costs as a result of these supplier rate increases but were charged the same firm rates they would have been charged had there been no supplier rate increases. The Commission and the court below recognized that Texas Eastern paid and absorbed these supplier rate increases[9] but held that Texas Eastern was not entitled to the resulting refunds because of the level of its past earnings.

The refusal of the Commission and the court below to determine the relative equities of the claims by Texas Eastern and its customers is squarely in conflict with *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949) and its progeny, and is utterly inconsistent with the position taken by the Commission in another earlier proceeding. In *Interstate* the Commission had ordered Interstate Natural Gas Company to reduce its rates. The court of appeals stayed the rate reduction but required *Interstate* to pay the amount of the reduction into the registry of the court. The Commission's rate reduction was subsequently affirmed. The question then arose as to who was entitled to the amounts deposited in the registry of the court. This Court held that such amounts should be disposed of "in accord with equitable principles," 336 U.S. at 583, so as to place the parties in the position they would have occupied *but for* the stay order.[10] In this connection, the Court held that if intermediate pipeline companies which

[9] The Commision found that "it is a matter of record that during the years in question, Texas Eastern did not file increased rates" (R. 748). The court below found that: "The increases were paid and absorbed by Texas Eastern in the sense that they were not passed on by Texas Eastern to its customers in the form of rate increases." (414 F.2d at 345, *infra* p. 27).

[10] In his concurring opinion, Justice Frankfurter pointed out that "the task of the court is to place the parties in the position in which they would have been had there not been a postponement of the effective date of the rate reduction" (336 U.S. at 586).

purchased gas from Interstate had passed on the rate reduction to their customers they would be entitled to their share of the funds. Thus, Justice Douglas, speaking for the majority in *Interstate*, stated (336 U.S. at 582):

> "Moreover if the pipe-line companies [which purchased directly from Interstate] passed on to their customers the rate reduction from the date of the Commission's order (as Mississippi alleges it did), they would be entitled to a return of payments they made into the fund."

Under this same rationale, it is clear that Texas Eastern was equitably entitled to the subject refunds rather than its customers, who are in the same position as if no rate increase had ever been filed by Texas Eastern's suppliers. Having absorbed all of the supplier rate increases, Texas Eastern occupies precisely the same status as the intermediate pipelines in *Interstate*, which, during the pendency of the stay, had passed on the rate reductions to their customers.

The decision of the court below is also in conflict with the progeny of *Interstate*. The case most comparable is *Northern Natural Gas Co.* v. *FPC*, 215 F.2d 892 (8th Cir. 1954), which involved a court-ordered stay of the Commission's disallowance of certain elements of a Section 4(e) rate increase filed by Northern. The proceeding was brought by Northern's customers for distribution of the fund accumulated pursuant to the court's stay order. The court stated that its objective was to prevent a windfall or unjust enrichment. Those customers, which, like Texas Eastern here, had not passed on to consumers Northern's rate increase were held to be unconditionally entitled to reimbursement of the excessive amounts they had paid pursuant to the court's stay order. The court rejected the contention of certain distributors that entitlement to the

funds in question should be determined by a retroactive review of the level of earnings generated by past firm rates. In other words, the Eighth Circuit rejected the basis — the level of earnings generated by past rates — used by the Commission and approved by the Fifth Circuit in this case to deny Texas Eastern's right to the subject refunds.[11]

The decision below is also in conflict with *United Fuel Gas Co.* v. *FPC*, 367 F.2d 34 (4th Cir. 1966), which recognized the crucial importance of absorption of supplier rate increases in determining equitable entitlement to refunds resulting from the disallowance of supplier rate increases. In that case, the court dismissed as premature appeals from refund retention orders but pointed out that one of the reasons for its decision was that the Commission had not had an opportunity to determine whether the excessive rates had been passed on or absorbed, stating (367 F.2d at 37):

> "The court must determine who bore the burden of the excessive rates and distribute the refunds accordingly."

In this case there is no question as to "who bore the burden of the excessive rates". They were paid and absorbed by Texas Eastern and the refunds should have been distributed accordingly.

Finally, the orders under review and the decision of the court below are in conflict with the position previously taken by the Commission in *Texaco Inc.*, 27 F.P.C. 847 (1962). In that case, suppliers had filed Section 4 rate increases which were subsequently disallowed. In proceedings to determine the disposition of the refunds, it was

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[11] See also *Northern Natural Gas Co.* v. *FPC*, 245 F.2d 447, 449-50 (8th Cir. 1957); *Northern Natural Gas Co.* v. *FPC*, 254 F.2d 466 (8th Cir. 1958).

contended that retention of the refunds might result in a windfall to the recipient pipelines. The Commission rejected this contention and held that the pipelines were entitled to the refunds because they had not passed on the supplier increases but had absorbed such increases. In this connection, the Commission found (27 F.P.C. at 849-50):

> "The second branch of Union's argument is that the Commission, in considering the equities, failed to take into account the possibility that the refunds might be a windfall to the recipient pipelines. The fact is, however, that before issuing the March 5 order, the Commission took steps to verify that its action would not yield the windfall. The records of the Commission confirm representations made by Transco in these proceedings to the effect that the *increased costs* attributable to the gathering tax *were never passed on in the form of higher rates.* Having *absorbed* the tax, Transco will not be unjustly enriched if it is allowed to retain amounts refunded to it pursuant to our March 5 order."

Thus, the orders of the Commission and the decision of the court below conflict with prior decisions at every level of the judicial ladder — from the Commission to this Court. Such conflict is clear and irreconcilable and should be resolved by the granting of certiorari.

5. Illegal Retroactive Application of a Change In Established Disposition of Refunds Under Section 4(e).

As previously noted, during the years 1961 through 1964, as a matter of course, the Commission required the payment of supplier refunds to pipelines which had paid increased rates and permited these pipelines to retain such refunds if they had not filed tracking rate increases. No attempt was made to determine the pipelines' entitlement

to such refunds based on a retroactive review of their past firm rates. In the orders under review, the Commission did not deny that this had been its past practice with respect to the disposition of refunds. In fact, it recognized the "normal practice of intermediate pipelines not under an express flow-through obligation retaining all supplier refunds" (R. 754). However, the Commission changed its "normal practice" and retroactively applied such change to refunds relating to "Texas Eastern's suppliers' rate increases during the years 1961-64 inclusive" (R. 735).

The court below recognized the Commission's past practice, 414 F.2d at 346, *infra* p. 29, but sanctioned its new policy on the ground that the Commission "was not precluded from adopting the new policy" (414 F.2d at 349, *infra*, p. 34).

Clearly, the court below misunderstood Texas Eastern's complaint and the error in the Commission's action. Texas Eastern's argument in this instance was not that the Commission was precluded from adopting a new policy as to the disposition of refunds — but rather that the Commission could not retroactively *apply* such new policy to Texas Eastern. In this connection, it should be emphasized that this was a situation "where an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates". *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966). In that case, the NLRB was reversed on a procedural point, but Judge Friendly noted that since the established rule had been considered consistent with the statutory design for 15 years, the "ill-effect of the retroactive application of a new standard so far outweighed any demonstrated need for immediate application to past conduct as to render the board's action arbitrary." The "antipathy to retroactive law making by courts and legis-

latures has deep historical roots" because "it tends to destroy predictability and to undercut reliance — both important aims of the law". *Leedom* v. *International Bd. of Elec. Workers,* 278 F.2d 237, 240 (D.C. Cir. 1960).

The Commission's retroactive application of its new policy in this case is puzzling as well as inequitable; puzzling, because the Commission has uniformly made policy changes prospective in the interest of administrative fairness. Thus, the Commission refused to apply retroactively its new principles concerning the treatment of liberalized depreciation prior to the date on which the new policy was announced. The Commission's action was affirmed in *City of Chicago* v. *FPC,* 385 F.2d 629 (D.C. Cir. 1967), *cert. den.,* 390 U.S. 945, where Judge Leventhal stated:

> "Explaining why its ruling was not made retroactive to the effective date of Natural's rate increase, the Commission stated 'that in *Alabama-Tennessee* we were announcing a new policy and overruling previous decisions. It was therefore not equitable, contrary to the contentions of Chicago, to make our determination effective before February 3, 1964, but on that date the industry was informed of the new policy, and it was appropriate that refunds should be ordered from then.'" 385 F.2d at 641.

Retroactive application was particularly unfair in this case because Texas Eastern had irretrievably changed its position and entered into and partially performed contracts in reliance upon the established disposition of refunds. The evidence is clear and undisputed that Texas Eastern would not have agreed in the 1961 settlement to flow through refunds resulting from the disallowance of supplier rate increases included in the settlement cost of service if it had not believed that, pursuant to "the then normal practice", it would be entitled to receive and retain refunds resulting from the disallowance of any subsequent

supplier rate increases it paid and absorbed (R. 417-18). Likewise, Texas Eastern would not have agreed to the settlement of certain supplier rate increases if it had not believed that it would be entitled to receive and retain specified refunds which the suppliers were required to make. Clearly, this is a case where the Court should "intervene to protect against unfairness resulting from an administrative adjudication which retroactively changes law on which a party has relied". 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 17.09, at 544.

The unfairness is compounded by the discrimination inherent in the Commission's retroactive application of its new policy. The Commission used its so-called "normal practice" to dispose of substantial refunds payable to other pipelines during the years 1961-1964. If these pipelines had absorbed the supplier increases, they were allowed to retain the resulting refunds. Now, the Commission has singled out Texas Eastern for a difference in treatment not justified by a difference in conditions. Accordingly, certiorari should be granted to avoid discriminatory application of the Commission's "normal practice" as well as the inequity inherent in the retroactive application of its "newly enunciated policy."

6. Adverse Impact On Settlement Contracts.

Ever since this Court's *Phillips* decision,[12] the Commission has found settlements indispensable to the proper administration of the Natural Gas Act. The need to promote settlements was summarized in *Texas Eastern Transmission Corp.* v. *FPC*, 306 F.2d 345 (5th Cir. 1962), *cert. den.* 375 U.S. 941, as follows:

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[12] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

> "For Commission approved voluntary settlements are an important and desirable mechanism as the Commission undertakes the staggering burden of dealing with the ceaseless flow of the ever more complicated problems facing an inadequate staff as a result of the celebrated 1954 Phillips decision. Consequently, settlements should be encouraged, not discouraged."

In 1961 and 1962, Texas Eastern agreed to and the Commission approved contracts for the settlement of supplier rate increases which Texas Eastern had paid but not passed on to its customers.[13] Neither the Commission nor the court below denies that these settlements provided for the payment of future refunds to Texas Eastern. Nor do they dispute the fact that during the intervening years substantial refunds were paid to Texas Eastern pursuant to these settlement contracts. However, the court below sanctioned the Commission's change in the disposition of refunds specified in these settlements on the ground that they were not concerned with entitlement to the refunds ordered. This is inconceivable since the bulk of the settlement contracts and related Commission orders were devoted to meticulously detailing the rights of Texas Eastern and other parties to refunds.[14] These provisions would have been meaningless and Texas Eastern would never have agreed to the settlement contracts if the designated recipients of refunds could be changed at the whim of the Commission.

If the settlement process is to work effectively, then settlements must be binding on all parties. The Commission simply cannot change the terms of settlement contracts "out of the thoroughly commendable and understandable feeling that unless that is done the result is not as good as it ought to have been." *Texas Eastern Transmission*

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[13] See note 2, *supra*, and discussion at p. 10, *supra*.

[14] See Appendix to Texas Eastern's Petition for Rehearing filed with the court below (R. 782).

Corp. v. *FPC, supra,* 306 F.2d at 348. In the present case the change in the specified disposition of refunds is clearly erroneous and will discourage future rate settlements unless corrected by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Section 4(e) of the Natural Gas Act, 52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c(e).

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect, and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased

rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26477

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

(JUNE 20, 1969)

Before BELL and THORNBERRY, Circuit Judges and CHOATE, District Judge.

BELL, Circuit Judge: This case involves the disposition of refunds resulting from the disallowance under § 4(e) of the Natural Gas Act, 15 USCA, § 717(c)(e), of rate increases collected during the period 1961-64 from Texas Eastern by its suppliers. The increases were paid and absorbed by Texas Eastern in the sense that they were not passed on by Texas Eastern to its customers in the form of rate increases. The refunds, held in escrow by the suppliers and amounting to more than $10,000,000,

were claimed by Texas Eastern. The claim was rejected by the Commission on the premise that the refunds should flow through to the distributor customers of Texas Eastern for the benefit of the consuming public.

The sole issue before the Commission was the entitlement of Texas Eastern to the refunds. Texas Eastern, an interstate pipeline carrier of natural gas, purchases gas from producer-suppliers. It, in turn, sells to distributors who sell to the consumer. The producer-suppliers are not involved, their rate increases having already been disallowed; hence, the creation of the refunds. On the entitlement hearing, Texas Eastern, of necessity but indirectly, was asserting such equities as it had to the refunds as against the right of consumers to just and reasonable rates.

In *Texas Eastern Transmission Corp.* v. *Federal Power Commission,* 5 Cir., 1966, 357 F.2d 232, the court dismissed, on the ground of prematurity, petitions for review of the Commission orders directing the suppliers to retain the refundable amounts until the question of entitlement as between the pipeline and the customers of the pipeline could be determined. Judge Wisdom, speaking for the court, adverted to the novelty of the question presented as follows:

> "The novel orders of the Federal Power Commission attacked in these proceedings mark the Commission's decision to take a new and close look at its jurisdiction over refunds generated under Section 4(e) of the Natural Gas Act. . . . Does the statute permit and does sound policy require the Commission to control the disposition of refunds? To what extent may the Commission require the flow-through of refunds from natural gas producers to jurisdictional pipeline companies to non-jurisdiction local distributors and, indirectly, to the ultimate consumers for whom, the

> Supreme Court has said, the Act provides a 'complete, permanent, and effective bond of protection'? . . . To obtain the answers to these and related questions, the Commission ordered United Gas Pipe Line Company to retain certain refunds, reflecting excessive earnings, 'subject to further order of the Commission [after a hearing] directing the disposition of those amounts.' These retention orders state that their purpose is to enable the Commission to determine 'whether United's immediate customers, or the customers of such customers, are legally and equitably entitled to retain the refunds'." 357 F.2d at 232-233

The hearing and orders which followed that decision form the subject matter of the petition to review now before us. The Commission's approach was two-fold to the extent that it was concerned with refunds and thus with past activity as well as with prospective procedures.

Under past policy of the Commission, when a supplier rate increase was disallowed, the refund went to the pipeline unless the pipeline had increased its rates in response to the supplier increase. Where the pipeline had increased its rates under these circumstances, it would be required to flow through refunds to its customers. The policy adopted in these proceedings, for prospective use, was the requirement that a pipeline, to claim supplier increase refunds, must file tracking rate increases. Since Texas Eastern was not, at the time the Commission entered its refund orders against the suppliers, able to file tracking rate increases for the years 1961-1964, the Commission afforded it an opportunity to make a factual showing of entitlement to the refunds in question.

The burden imposed on Texas Eastern evolved into showing that it earned less than a reasonable rate of return in the years in question. No proof was offered for the year 1961 and the proof for the years 1962-1964 was such

that the Commission concluded that Texas Eastern earned more than a reasonable rate of return. Texas Eastern's claim was thus denied.

The Commission justified its policy departure on the ground that the primary purpose of the Natural Gas Act was to protect ultimate consumers of natural gas from excessive charges and that the Act must be applied so as to protect their collective interests. Thus, the Commission said: " . . . we find that under the Act the ultimate consumers of natural gas are proper beneficiaries of our disposition of the subject refunds." Texas Eastern points to the haitus in power in that the Commission lacks jurisdiction to see that the refunds will go to ultimate consumers; that its authority can extend only so far as to give the refund to distributors; and that there is no assurance that ultimate consumers will in any way benefit. Thus, Texas Eastern argues that the dispute is between itself and its distributor-customers, and that as between these two all equities lie with it.

Of the several issues presented, the foremost is directed to the question of the power of the Commission to order these refunds. This, in turn, depends on a statutory base. Assuming a statutory base, a further issue is whether the Commission was barred from adopting the new policy by its past actions. Texas Eastern also asserts that as to the refunds under consideration, the Commission's order is barred under the reparations doctrine, and, as to some if not all of the refunds, by its 1961 settlement agreement with the Commission, and by final orders entered by the Commission disposing of certain supplier rate increases. The last issue, assuming statutory power and no bar, is whether the Commission's order, including its new refund flow through policy, was rationally based.

I.

We will first consider the question of power. We find the necessary statutory authority for the action of the Commission. The statutory language is as follows:

> " . . . Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified." 15 USCA, § 717c (e)

This statutory authority to require funds must be coupled with the fact of the overriding purpose of the Natural Gas Act to protect consumers in their purchase of gas to the end of keeping rates as low as possible. This purpose appears expressly in the Act, § (a)[1] and in the Supreme Court decisions. See, for example, *Federal Power Commission* v. *Hope Natural Gas Co.*, 1944, 320 U.S. 591, 610, 64 St.C. 281, 88 L. Ed. 333; *Atlantic Refining Co.* v. *Public Service Comm. of New York*, 1959, 360 U.S. 378, 388, 79 S.Ct. 1246, 3 L.Ed.2d 1312; *Federal Power Commission* v. *Tennessee Gas Transmission Company*, 1962, 371 U.S. 145, 154, 83 S.Ct. 211, 9 L.Ed.2d 199.

Texas Eastern argues that the statutory language must be construed in light of the accounting provision of the Act[2]

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[1] 15 USCA, § 717(c)(a).

[2] 15 USCA, § 717c(e), supra:

> ". . . to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, . . ."

and that as thus construed, it appears that refunds are to be paid to the one who is out of pocket. Thus, it is urged, since Texas Eastern paid the increased costs to its suppliers without passing such costs on to its distributors, it is the only party entitled to restitution through the receipt of the refunds. Texas Eastern finds supoprt for its accounting provision argument in *Federal Power Commission* v. *Sunray, DX Oil Co.*, 1968, 391 U.S. 9, 24, 88 S.Ct. 1526, 20 L.Ed. 2d 388, where the Supreme Court held that the Commission could not order a refund in excess of certificated rates. This was because, in reading the refund and accounting provisions of § 4 (e) together, a refund could not exceed amounts received by reason of the increase; otherwise, the court said, would be to sanction reparations. Texas Eastern urges, based on *Sunray*, that § 4 (e) and the accounting section read together, allow disposition of refunds only to those persons in whose behalf such amounts were paid. We are unable to find this restriction in the applicable language.

The Commission, for its argument, points to the legislative history of the Act which indicates that early drafts included a provision to refund to the persons in whose behalf the sums constituting the refunds were paid. This language parallels provisions of the Interstate Commerce Act, 49 USCA, § 15 (7), and the Federal Power Act, 16 USCA, § 824d (e). This provision was, however, eliminated in the final draft of the Natural Gas Act and the Commission contends that it was therefore purposely not limited to ordering refunds to the pipeline-payer. This argument lends little weight to our determination.

Our view is that the Commission was authorized to see to disposition of the refunds in question on the basis of the purpose of the Act to protect ultimate consumers of natural gas. It must be borne in mind that the Commission

created the refunds by disallowing supplier rate increases and by requiring that the sums in question be retained by the suppliers pending determination of entitlement. Texas Eastern could have filed rate increases to track the supplier increases. It chose not to do so for reasons of its own. One reason, no doubt, was that the Commission could have investigated the rates in the light of Texas Eastern's earnings.

Here the Commission afforded Texas Eastern the opportunity of justifying its entitlement to the refunds on a earnings basis without the concomitant risk of an investigation of its rates as would have been the case in the event of rate filings. This procedure was adopted to protect Texas Eastern in the face of the change in Commission policy as to disposition of refunds. This was a fair approach from the standpoint of protecting the interest of Texas Eastern and the consumer. To adopt Texas Eastern's position that it is, *ipso facto,* entitled to the refunds by virtue of having paid and absorbed them would be to countenance rate making by the producer-suppliers and Texas Eastern outside the protective ambit of § 4 (e). This approach would do violence to the statutory scheme by avoiding, to the extent that the refunds exceed a fair return to Texas Eastern, any rate regulation whatever except under § 5 of the Act. 15 USCA, § 717 (d).

Texas Eastern places heavy stress on the literal meaning of the word "refund" and urges that it can only mean repayment to the one who paid. We place stress on the fact that the statute does not expressly require this course of action and that such a narrow construction would make it impossible to give effect to the purposes of the Act. This is a classic case of filing the intersticies within the outer limits of a statute. Cardoza, The Nature of the Judicial Process, Yale U. Press., pp. 112-113. The history of the

Natural Gas Act is one of interstitial construction beginning with the *Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035, when the court concluded that the Commission was empowered to regulate rates of producers. See *Sunray* supra, 391 U.S. 9, 16-18.

Our conclusion is buttressed by the rationale of *Federal Power Commission* v. *Interstate Natural Gas Company*, 1949, 336 U.S. 577, 69 S.Ct. 775, 93 L.Ed. 895, where refunds, created by the court's staying rate reductions, were ordered disbursed in accordance with equitable principles even to the extent of by-passing the gas purchasers who made the payments into the fund.

We conclude that the Commission was possessed of the necessary statutory authority. Moreover, it appears that the procedure accorded Texas Eastern to establish its right to the refund was appropriate and not lacking any element of fairness.

II.

We come next to the contention that the Commission was barred by its past actions from adopting the new refund policy. This argument runs from the proposition that the Commission had never before adopted such a policy; instead, the Commission in the past had consistently permitted all refunds resulting from the disallowance of supplier rate increases to be paid to the pipeline which paid the increased rates unless the pipeline had filed a corresponding rate increase, in which event the refunds would flow through to customers of the pipeline.

There is no merit whatever in this contention. The Commission was not precluded from adopting the new policy. The fact is that the Commission had neither adopted nor rejected the new policy. The administration of the Natural Gas Act since its enactment in 1938 has been one of grad-

ual development. See, for example, *Phillips Petroleum Co.* v. *Wisconsin*, supra; and *Sunray*, supra. As the court noted in *United States* v. *Morton Salt Company*, 1950, 338 U.S. 632, 647-648, 70 S.Ct. 357, 94 L.Ed. 401, power is not lost by being allowed to lie dormant.

Texas Eastern also asserts that the Commission's order constitutes a reparation order and is thus barred. The Supreme Court pointed out in *Sunray* that the Commission has no reparation power. 391 U.S. at 24. This is a form over substance or substance over form question. Texas Eastern's position is that the denial to it of the refunds is bound to be a reparation order since it paid the amounts which constitute the refunds. The weakness in this argument is that one must assume that Texas Eastern was entitled to the refunds in the beginning. But this begs the question. The Commission created the refunds by its order against the suppliers. If the Commission has, as we have held, the power of disposition over the refunds, then the question becomes one of entitlement and not of reparations. Cf. *Federal Power Commission* v. *Interstate Natural Gas Company*, supra, 336 U.S. at 582-583. Cf. also *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 1965, 382 U.S. 223, 229-230, 86 S. Ct. 360, 15 L.Ed.2d 284. This contention is without merit.

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We conclude also that the order was not barred by the 1961 settlement agreement between Texas Eastern and the Commission. That settlement involved supplier rate increases which are not here involved. To prevail, it is necessary for Texas Eastern to show that the agreement expressly or impliedly embraced the rate increases which gave rise to the instant refunds. We are unable to find any such coverage in the settlement agreement. It is true that some of the rate increases which gave rise to those here had been filed when the settlement agreement was consummated. That agreement, however, is restricted, as

we construe it, to other increases and the power of the Commission as it respected the rate increases giving rise to the refunds here was unabated by the agreement.

This is likewise true as to the final orders issued by the Commission in disposing of certain other supplier rate increases. These proceedings were concerned with the lawfulness of the supplier rates in issue and did not govern the entitlement questions now in issue.

III.

Lastly, we conclude that the order of the Commission was rationally based. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body". *Rochester Telephone Corp.* v. *United States,* 1939, 307 U.S. 125, 146, 59 S.Ct. 754, 83 L. Ed. 1147, 1166.

The answer to the rational basis inquiry depends, in the end, on the factual and legal basis for the Commission's order and whether it protects the ultimate consumer. There is a more than ample factual basis for the order from the standpoint of Texas Eastern having failed to justify the refund on an earnings basis.

The essence of Texas Eastern's approach is that a rational basis was lacking due to the dilemma posed by the Natural Gas Act in that the Commission has no authority over the ultimate disposition of the refunds by the distributors. The rates of the distributors are regulated by the states and whether the ultimate consumers will receive the refunds is within the province of the state regulatory bodies. *Federal Power Commission* v. *Interstate Natural Gas Company,* supra; *Central States Electric Company* v. *City of Muscatine,* 1945, 324 U.S. 138, 65 S.Ct. 565, 89 L.Ed. 801. The Commission noted the limitation on its jurisdiction in this respect but assumed that the state regulatory auhorities

would discharge their respective responsibilities to benefit consumers. It pointed out that the regulatory commissions of California and New York had made clear their intentions in this regard. The Commission's view was that it was serving the statutory purpose of the Act of benefiting ultimate consumers by placing the refunds within the jurisdiction of the state regulatory authorities so as to place them in position to benefit the ultimate consumers. The Commission could no guarantee benefits for the ultimate consumers but absent its new policy there would be no way to benefit the ultimate consumers. We conclude that this was a rational basis for the Commission refund order. It was an approach to effective Federalism within the framework and dictates of the Act.

The Commission protected Texas Eastern in the premises from the rigors of the retroactive application of a new policy by the procedure afforded it. Texas Eastern lost its claim on the merits as against the consumers but it may justly complain that its equities may exceed those of its distributor-customers in the event the refunds are not flowed through to the consumer. The matter has been remanded by the Commission to the hearing examiner for disposition of the refunds. The examiner held, and the Commission agreed, that ". . . In line with the *Interstate* case, further proceedings are necessary to insure that the sums here at issue, to the extent possible, be passed on to the ultimate consumers in accordance with the objectives of the Natural Gas Act." We have no doubt that satisfactory methods can be devised whereby the consumers will receive the benefit of these refunds. Creative federalism would teach a cooperative approach with the states to this end.

AFFIRMED.[3]

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[3] The petition to review involves the Commission's Opinion No. 540 issued May 3, 1968 and Opinion No. 540-A issued July 10, 1968.